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DAVID S. ROSENZWEIG  
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February 12, 2002

Mary L. Cottrell, Secretary  
Department of Telecommunications and Energy  
One South Station, 2<sup>nd</sup> Floor  
Boston, MA 02110

Re: Franklin W. Olin College of Engineering, D.T.E. 01-95

Dear Ms. Cottrell:

I have enclosed an original and nine (9) copies of the Reply of Boston Edison Company, d/b/a NSTAR Electric, to Franklin W. Olin College of Engineering's and Wellesley Municipal Light Plant's Oppositions to an Expedited Order to Maintain Status Quo Ante in the above-referenced proceeding.

I have also enclosed a Certificate of Service. Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, reading "David S. Rosenzweig". The signature is fluid and cursive, with the first name "David" being particularly prominent.

David S. Rosenzweig

Enclosures

cc: Robert Hayden, Hearing Officer  
Paul Afonso, General Counsel  
Ronald LeComte, Director, Electric Power Division  
William Stowe, Esq.  
Eric Krathwohl, Esq.  
Kenneth Barna, Esq.

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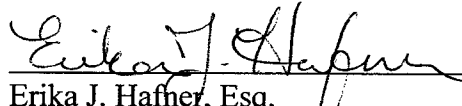
**COMMONWEALTH OF MASSACHUSETTS**  
**DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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Franklin W. Olin College of Engineering  
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D.T.E. 01-95

**CERTIFICATE OF SERVICE**

I hereby certify that I have served the foregoing document upon the Department of Telecommunications and Energy, and counsel for all parties, by hand or first class mail, in accordance with the requirements of 220 C.M.R. 1.05 (the Department's rules of Practice and Procedure).

  
\_\_\_\_\_  
Erika J. Haffner, Esq.  
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Boston, MA 02110  
(617) 951-1400

Dated: February 12, 2002

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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Petition of Franklin W. Olin College of Engineering

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D.T.E. 01-95

**REPLY OF BOSTON EDISON COMPANY, d/b/a NSTAR ELECTRIC, TO  
FRANKLIN W. OLIN COLLEGE OF ENGINEERING'S AND WELLESLEY  
MUNICIPAL LIGHT PLANT'S OPPOSITIONS TO AN EXPEDITED ORDER  
TO MAINTAIN STATUS QUO ANTE**

Now comes Boston Edison Company, d/b/a NSTAR Electric ("Boston Edison" or the "Company"), in reply to the oppositions of Franklin W. Olin College of Engineering ("Olin" or the "College") and Wellesley Municipal Light Plant ("WMLP") to the Company's Motion for an Expedited Order to Maintain Status Quo Ante (the "Motion"). In the Motion, Boston Edison requested that the Department provide the Company with the following preliminary relief: (1) an order directing Olin and WMLP to cease and desist the receipt and provision of temporary distribution service to Olin from WMLP, whether directly or indirectly; (2) an order directing Olin and WMLP to cease and desist from any activities regarding the installation of permanent facilities for the provision of electric service from WMLP to Olin; and (3) an order from the Department directing Olin and/or WMLP to immediately remove any such temporary or permanent facilities already installed.

Olin's and WMLP's oppositions to Boston Edison's Motion raise three primary arguments. First, Olin argues that Boston Edison is not seeking to maintain the status quo through its Motion, but rather to change it. Second, both Olin and WMLP argue that Olin's receipt of service from WMLP, through Babson College ("Babson"), is not a violation of Boston Edison's exclusive franchise right to serve customers in the Town of

Needham (“Needham”). Specifically, Olin and WMLP argue that Boston Edison’s right to serve Needham is not, in fact, exclusive. Finally, WMLP argues that the Department does not have the authority to provide the relief requested by the Company. Each of these arguments lacks merit for the reasons set forth below.

**I. BOSTON EDISON’S MOTION SEEKS A RETURN TO THE STATUS QUO THAT EXISTED PRIOR TO THE VIOLATIONS OF LAW CURRENTLY OCCURRING.**

Olin argues that Boston Edison’s Motion seeks to change the status quo, rather than preserve it, because the Company seeks to have Olin cease and desist from its receipt of electric distribution service from a utility other than Boston Edison (Olin Opposition at 4-10). Olin argues that, because prior to filing its petition with the Department, Olin had been receiving distribution service at a point in Wellesley for approximately one year, and that Olin continues to receive such service at that location, denial of the Motion will result in the status quo being maintained during the pendency of this proceeding.<sup>1</sup> However, it is undisputed that Olin is a customer located in Needham who is now receiving distribution service from WMLP (whether indirectly or directly) at a location in Wellesley (see Response to Information Request BE-1-5, Attachment BE-1-5B). At the same time, Olin’s own petition seeking Department authorization to receive distribution service from WMLP is pending. Thus, Olin’s

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<sup>1</sup> This argument seems to imply that, because the violation has been continuing for so long, it is somehow less severe or that it requires a less immediate remedy. From Boston Edison’s perspective, precisely because the violation has been part of an ongoing and calculated course of conduct to skirt legal requirements regarding electricity distribution, the continuing violation is more extreme and necessitates immediate action to prevent a further entrenchment of Olin and WMLP in their efforts to sidestep the Department’s authority pursuant to G.L. c. 164, § 1B(a). In fact, it is only now with the receipt of several responses to Boston Edison’s discovery requests that the Company has learned the extent of the deliberate plan carried out by Olin and WMLP for more than a year. Up to the time of Olin filing its Petition with the Department, Boston Edison was unaware of such a plan and believed it could resolve service issues with Olin in a consensual manner.

current receipt of service in Wellesley, without Boston Edison's consent or Department approval, is an ongoing violation of law. See G.L. c. 164, §§ 1B(a), 47A.

In essence, Olin made a calculated decision to implement an elaborate plan to take temporary electric service in Wellesley without Department authorization, and it is now seeking after-the-fact approval from the Department for its historical and ongoing actions (see, e.g., Response to Information Request BE-1-7, Attachment BE-1-7A, including, inter alia, a December 15, 2000 email announcing Olin's decision to secure permanent service from WMLP and emails dated May 2, 2001 and May 22, 2001, discussing whether Department approval is required; see also Response to Information Request BE-1-8, Attachment BE-1-8A, including, inter alia, two September 17, 2001 emails discussing the technical manner in which Department approval may be circumvented). Accordingly, Boston Edison seeks only to have a return to the *legal status quo*, the status quo that existed prior to Olin initiating actions in violation of G.L. c. 164, § 1(B)(a) through its receipt of electric service in Wellesley. Thus, the Company requests that the Department order Olin to stop taking service from an entity (whether from WMLP or Babson) that is not Boston Edison, and to begin taking such service from Boston Edison, the electric distribution company with an exclusive franchise in Needham, the town in which the College is located. To the extent that: (1) Olin has a petition pending before the Department seeking authorization for Olin to be served in Wellesley, and (2) it is clear that Olin is already receiving service in Wellesley without such Department approval, it is incongruous for Olin to argue that its receipt of electric

service in Wellesley, even on a temporary basis, cannot be suspended while the Department considers the legality of that service.<sup>2</sup>

From responses to the Company's discovery requests that Olin has already provided in this proceeding, it has also become evident that Olin has taken affirmative and substantive steps regarding the provision of permanent electric service from WMLP. In Olin's opposition to the Motion, the College argues that whatever risk it is taking regarding the installation of permanent facilities is its own, in the event that the Department denies its Petition (Olin Opposition at 5). This stark acknowledgement by Olin certainly suggests that it has taken or is taking steps regarding the installation of permanent facilities. This conclusion is confirmed through Olin's responses to the Company's information requests in which, inter alia, Olin provided schematics of the campus including planned electrical facilities, dated January 25, 2002, and marked "ISSUED FOR CONSTRUCTION" (Response to Information Request BE-1-5, Attachment BE-1-5A; Attachment BE-1-5B). These plans show that certain facilities have been installed by Olin (e.g., 125A/13.8 kilovolt overhead service, underground tap and underground distribution network (Response to Information Request BE-1-5, Attachment BE-1-5A)), and others are planned to be installed in the near future (e.g., underground duct banks, electric cable, redundant switchgear (id.)). Finally, various communications between Olin, Babson and WMLP received through discovery clearly demonstrate Olin's intent, formed over a year ago, to receive electric service from

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<sup>2</sup> The fact that such service may be temporary and ostensibly supplied indirectly through Babson does not add merit to Olin's argument; rather, it demonstrates the "house of cards" that Olin has constructed to avoid taking service from Boston Edison without Department approval. Moreover, as discussed below, Babson's role in providing service to Olin raises a variety of additional legal issues with respect to Chapter 164.

WMLP (Response to Information Request BE-1-7, Attachment BE-1-7A; Response to Information Request BE-1-8, Attachment BE-1-8A).

Between the current temporary service that Olin receives through WMLP and the plans for and initial execution of such permanent service, the record demonstrates an ongoing course of action that is presuming the ultimate outcome of this case. Therefore, Boston Edison's request, pending the outcome of this proceeding, to place the parties in the status quo that existed before there were any statutory violations is necessary and appropriate.

## **II. OLIN'S RECEIPT OF DISTRIBUTION SERVICE FROM WMLP IS A VIOLATION OF BOSTON EDISON'S EXCLUSIVE FRANCHISE RIGHTS.**

WMLP argues that its provision of service to Babson, who then provides distribution service to Olin, is not a violation of the Company's franchise rights (WMLP Opposition at 1-3). Similarly, Olin argues that its receipt of electricity in Wellesley for use in Needham is not a violation of Chapter 164 because Boston Edison does not have an exclusive franchise in Needham, as evidenced by WMLP's prior provision of service to Babson's buildings in Needham (Olin Opposition at 4-10). Both WMLP's and Olin's arguments fail.

Specifically, WMLP argues that Olin is not in Boston Edison's exclusive service territory because, on the operative statutory date, July 1, 1997, WMLP served part of the Babson campus located in Needham in close proximity to the boundary with Wellesley.<sup>3</sup> Therefore, its argument goes, since WMLP was the actual service provider to areas of Needham owned by Babson, Boston Edison does not have an exclusive franchise to

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<sup>3</sup> WMLP's thesis is that it is entitled to service Olin because "WMLP was and continues to be the electric service provider to this area of Needham" (WMLP Opposition at 2, emphasis added).

serve a new customer, such as Olin, in Needham. However, WMLP's argument proves too much. In essence, taken to its logical extreme, it would say that, if WMLP served one customer (even with the adjacent distribution company's consent) in a town, it would have the right to serve any future customer in that town. A similar claim was made in Massachusetts Electric Company, D.T.E. 98-122, by a municipal light plant and the Department declined to adopt this interpretation of G.L. c. 164, § 1B(a). See id. at 5, 9-10. Simply because WMLP may have previously served Babson in certain limited parts of Needham, whether by historical right or through consent, does not lessen the exclusivity of Boston Edison's service territory in Needham; nor does it negate Boston Edison's exclusive right to service Olin as a new customer at that location in Needham.

Moreover, Olin argues that its receipt of service on land it owns (presumably in fee) in Wellesley for use in Needham does not violate the Company's franchise rights because WMLP has the right to serve in Wellesley, which is where Olin will physically receive service. However, the Department's decision on February 7, 2002 in Massachusetts Electric Company, D.T.E. 98-122 (2002) is controlling in such a case.

There, the Department stated that it would not countenance customer efforts:

to reconfigure or manipulate lot or parcel boundaries ("creative conveyancing," so to speak) or to engage in other stratagems, in order artificially to defeat the principal purpose of § 1B(a), viz., to conform electric distribution service territory boundaries, as these boundaries existed on July 1, 1997, to municipal boundaries and to do so "to the extent possible." Petitions that result from such stratagems will not likely be successful. Petitions based on lot or parcel boundaries, which have been reconfigured since July 1, 1997 to bring part and, arguably, therefore effectively all of a customer's premises into a different service territory will labor under a considerable burden to show that allowing the petition does not thwart Legislative intent.

Massachusetts Electric Company, D.T.E. 98-122, at 11 (emphasis added, footnote omitted).



“Creative conveyancing,” prohibited by the Department in the above-referenced decision, is the exact means by which Olin has attempted to secure electric distribution service from WMLP. It is clear that, by any reasonable measure, Olin is located squarely within Needham and its “presence” in Wellesley is both pretextual and extremely limited. For example, the only piece of property Olin owns in Wellesley is approximately 1,000 square feet and labeled as “not a buildable lot” (Response to Information Request BE-1-1, Attachment BE-1-1B). This compares to over 70 acres or more than 3 million square feet of land that Olin owns in Needham (Response to Information Request BE-1-18(b)).<sup>4</sup> Indeed, it is unambiguous that the sole purpose of Olin’s miniscule swatch of land in Wellesley is to achieve Olin’s bypass objectives; Babson and Olin negotiated extensively regarding the exact size of the parcel necessary to accommodate the specific electrical equipment Olin would require (Response to Information Request BE-1-7, Attachment BE-1-7A). Moreover, this property was deeded to Olin on October 31, 2001, just 10 days before its Petition was filed with the Department (Response to Information Request Attachment BE-1-4), and over a year after the rest of the Olin property was deeded by Babson to Olin, on March 7, 2000 (*id.*).

There can be little debate that this nub of property in Wellesley was acquired by Olin for the sole purpose of receiving electric service thereon, as is evident in numerous emails between relevant decisionmakers at Olin (Response to Information Request BE-1-7, Attachment BE-1-7A). The remainder of Olin’s services, including water, sewer, and natural gas, are all provided by Needham utilities as opposed to utilities serving

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<sup>4</sup> Approximately 99.97 percent of the land owned by Olin is in Needham and 0.03 percent is in Wellesley (*see* Response to Information Request BE-1-1, Attachment BE-1-1B; Response to Information Request BE-1-18).

Wellesley (Responses to Information Requests BE-1-23; BE-1-24; BE-1-25). Similarly, Olin's mailing address is in Needham, it has paid taxes only to Needham, its buildings are located exclusively in Needham and 100 percent of its electricity load will be consumed in Needham (Responses to Information Requests BE-1-6; BE-1-18; BE-1-20; BE-1-21). In short, Olin's only connection to Wellesley was contrived in order to establish a de minimis physical presence in Wellesley to secure electric distribution service in a manner that attempts to circumvent legislative restrictions and intent.

Accordingly, based on both G.L. c. 164, § 1B(a) and relevant Department case law, WMLP's and Olin's arguments regarding the exclusivity of Boston Edison's franchise right are without merit.

### **III. THE DEPARTMENT HAS THE AUTHORITY TO GRANT THE RELIEF SOUGHT BY BOSTON EDISON.**

In its Opposition to Olin's Motion, WMLP argues that the Department lacks the equitable power to provide the relief requested by the Company (WMLP Opposition at 4-5). However, the Department recently confirmed that it has the authority to interpret G.L. c. 164, § 1B(a) in resolving service territory disputes. See Massachusetts Electric Company, D.T.E. 98-122, at 7. Moreover, by filing its Petition in the case, Olin has acknowledged and acquiesced to the Department's jurisdiction over this matter. WMLP, for its part, has also conceded the Department's authority by stating on the record that it would not serve Olin without approval from the Department pursuant to G.L. c. 164, § 47A (WMLP Motion to Intervene at ¶ 9). Thus, it is clear that all of the current parties to this proceeding have submitted to the Department's jurisdiction over the subject matter of the pending dispute. There is no claim by any of the parties that the Department lacks the authority to rule on: (1) whether Boston Edison has an

exclusive franchise right in Needham; (2) whether WMLP has the right to serve Olin as a customer located in Needham; and/or (3) whether Olin has the right to choose between Boston Edison and WMLP for its electric distribution service in Needham. Nor is there a claim by any party that the Department's authority is dependent on whether that distribution service is temporary or permanent. Inasmuch as Olin is presently receiving temporary service from a source other than Boston Edison, the Motion seeks the Department's preliminary determination that, pending a determination on the merits of Olin's request to be served by WMLP, Olin must receive service from Boston Edison. It simply defies logic for WMLP to intervene in this proceeding for the express purpose of obtaining Department approval to serve Olin and then to argue in its Opposition that the Department lacks the authority to determine who should serve Olin pending a decision on the merits. For WMLP now to assert that the agency lacks jurisdiction is at odds with its own claims and the entire premise of this case.

Furthermore, should the Department grant Boston Edison the ruling requested in the Motion, compliance with that order by all parties would be presumed. However, in the event that one or more parties chose not to abide by the Department's decision, the Department would have the authority to seek to have its order enforced pursuant to G.L. c. 164, § 79.<sup>5</sup> In addition, the Company would also have the ability to seek declaratory and injunctive relief to enforce the Department's order should parties choose to disregard it.

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<sup>5</sup> G.L. c. 164, § 79 states: "The supreme judicial or superior court shall have jurisdiction in equity, upon application of the [D]epartment, to enforce its lawful orders and all laws relative to cities and towns engaged in the manufacture and sale or distribution and sale of electricity or gas, generation, transmission or distribution companies, or suppliers."

#### **IV. BABSON'S ROLE IN THE PROVISION OF ELECTRIC SERVICE TO OLIN IS IN VIOLATION OF CHAPTER 164.**

Through discovery responses provided by Olin and WMLP in this proceeding, it has become apparent that Babson has a central role in this dispute, in that Babson is providing electricity and distribution service to Olin. This provision of service violates several provisions of Chapter 164 and places Babson under the jurisdiction of the Department.

Babson's current role as the "middleman" between WMLP and Olin allows WMLP to argue, with diminishing credibility,<sup>6</sup> that it is only serving a current customer and therefore it is not in violation of G.L. c. 164, § 47A(b). However, as discussed above, in Section II, supra, any provision of electric service to Olin's campus in Needham, which is not through Boston Edison, is a violation of Boston Edison's franchise rights pursuant to G.L. c. 164, § 1B(a). Thus, by providing service to Olin through some vague "accommodation" agreement (see Response to Information Request BE-1-7, Attachment BE-1-7C),<sup>7</sup> Babson is violating G.L. c. 164, § 1B(a).

Moreover, Babson's current provision of service to Olin constitutes the "distribution" of electricity. See G.L. c. 164, § 1. The statutory definition of "distribution" is "the delivery of electricity over lines which shall operate at a voltage

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<sup>6</sup> WMLP's position on Babson is duplicitous. On the one hand, WMLP asserts any resale by Babson would be in violation of its tariffs and that no resale by Babson is occurring (see WMLP Petition to Intervene at ¶ 12 and Response to Information Request BE-2-18); indeed, WMLP suggests that no metering is occurring between Babson and Olin (Response to Information Request BE-2-19). On the other hand, WMLP professes that it has no direct knowledge of the temporary facilities involved in the case of Babson and Olin, that it doesn't know about the specific arrangements between the two colleges and that it has no reason to investigate or inquire (Responses to Information Requests BE-2-23; BE-2-31; BE-2-32; BE-2-33). How WMLP reconciles these various claims is not clear; what is clear is that WMLP is not asking any questions to which it may not want to hear the answer.

<sup>7</sup> Through additional discovery, Boston Edison will ascertain the specifics of this loosely described "accommodation" between Babson and Olin.

level typically equal to or greater than 110 volts and less than 69,000 volts to an end-use customer within the [C]ommonwealth.” Id. Importantly, “[t]he distribution of electricity shall be subject to the jurisdiction of the [D]epartment.” Id. Babson currently uses a 13.8 kilovolt (or 13,800 volts) distribution system to service its campus (and Olin’s), and this rating certainly falls within the statutory definition of “distribution” (Response to Information Request BE-1-5, Attachment BE-1-5A). In addition, a “distribution company” is defined as “a company engaging in the distribution of electricity or owning operating, or controlling distribution facilities.” G.L. c. 164, § 1. Clearly, Babson is currently distributing electricity to a third party, Olin,<sup>8</sup> and it owns, operates and controls distribution facilities (see Response to Information Request BE-1-5, Attachment BE-1-5A). Thus, pursuant to the above-referenced definitions, Babson is a distribution company engaged in the distribution of electricity to Olin and, therefore, is subject to Department jurisdiction.

Olin claims that Babson is currently receiving distribution service from WMLP and then providing that service to Olin as an “accommodation” (see Response to Information Request BE-1-7, Attachment BE-1-7C). However, there is an explicit provision in WMLP’s “Large General Service Primary” tariff, under which Babson receives service, that states: “This rate schedule is not available where any portion of the electric power and energy purchased from the WMLP is resold” (Response to Information Request BE-1-8, Attachment BE-1-8A). Because Babson is providing the distribution service pursuant to the accommodation agreement between Olin and Babson

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<sup>8</sup> Although the current service provided to Olin is labeled by Olin and WMLP as “temporary,” this is an unimportant distinction because the relevant section does not differentiate between temporary and permanent distribution service. See G.L. c. 164, § 1.

(see Response to Information Request BE-1-7, Attachment BE-1-7A), where collaboration between the two colleges is described as a mutual benefit and goal (see Response to Information Request BE-1-7, Attachment BE-1-7C at 1), there is consideration being exchanged between Babson and Olin, and Babson is selling distribution service to Olin.<sup>9</sup> Thus, Babson's actions are in conflict with WMLP's tariff, and it is acting as a distribution company without the Department's approval in violation of Chapter 164.<sup>10</sup>

Based upon the above-described violations, Babson is subject to the Department's jurisdiction and is an entity necessary for the just adjudication of the current proceeding by the Department. The Massachusetts Rules of Civil Procedure provide that a person "shall be joined as a party in [an] action if ... in his absence complete relief cannot be accorded among those already parties." Mass. R. Civ. P. 19(a). Where Babson is acting as a "middleman" and is the essential intermediary between WMLP and Olin, it is necessary to join Babson in order to provide complete relief. Accordingly, in a separate motion filed herewith, the Company is respectfully requesting that the Department take appropriate action within its authority to join Babson as a party to this proceeding.

**WHEREFORE**, for all of the foregoing reasons, Boston Edison requests that the Department expeditiously grant its request for preservation of the status quo ante, and for such other and further relief as may be warranted.

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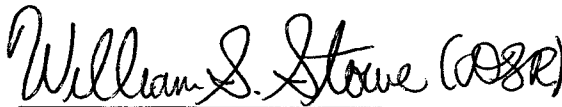
<sup>9</sup> It is important to note that, although Boston Edison believes Babson is engaging in the sale of electricity under chapter 164, the definitions of "distribution," "distribution company" and "distribution service" make no reference to a sale occurring. See G.L. c. 164, § 1. Therefore, regardless of the presence or absence of a sale, Babson has engaged in distribution activities with a third party placing it subject to the Department's jurisdiction.

<sup>10</sup> Babson may also be subject to regulation as an "electric company." See G.L. c. 164, §§ 1, 2.

Respectfully Submitted,

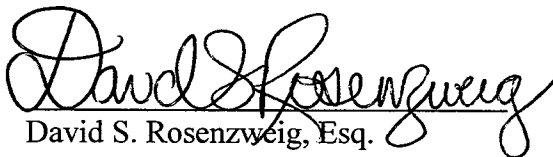
**BOSTON EDISON COMPANY, d/b/a  
NSTAR ELECTRIC**

By its attorneys,

Handwritten signature of William S. Stowe in cursive script.

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Dated: February 12, 2002

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